



State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095

(603) 271-3503 FAX (603) 271-5171



Environmental Soil Management, Inc.  
67 International Drive  
Loudon, NH 03307

**NOTICE OF PROPOSED  
ADMINISTRATIVE FINE  
AND HEARING**

**No. AF 01-005**  
January 30, 2001

**I. Introduction**

This notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Waste Management Division ("the Division") to Environmental Soil Management, Inc., pursuant to RSA 149-M and Env-C 601.05. The Division is proposing that a fine of \$ 1,500 be imposed against Environmental Soil Management, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

**II. Parties**

1. The Department of Environmental Services, Waste Management Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Environmental Soil Management, Inc. (ESMI) is a corporation having a mailing address of 67 International Drive, Loudon, NH.

**III. Summary of Facts and Law Supporting Claims**

1. RSA 149-M authorizes the Department of Environmental Services ("DES") to regulate the management and disposal of solid waste. RSA 149-M:7 authorizes DES to adopt rules to implement RSA 149-M. Pursuant to this authority, DES has adopted NH Admin. Rules Env-Wm 100-300 and 2100 *et seq.* ("Solid Waste Rules").
2. RSA 149-M:16 authorizes the Commissioner of DES to impose administrative fines of up to \$2,000 per offense for violations of RSA 149-M or rules adopted pursuant thereto. Pursuant to RSA 149-M: the Commissioner has adopted Env-C 612 to establish a schedule of fines for violations of RSA 149-M and rules adopted pursuant thereto.
3. On October 20, 2000, Division personnel received a verbal complaint that thermally-treated soils were being hauled from the ESMI facility in Loudon and dumped on a residential property owned by Andrew Drobat located off Rangeway Road which continues into Leg Ache Hill Road in Dunbarton, NH.
4. On October 25, 2000, Division personnel received a written complaint (dated October 19, 2000) that treated contaminated waste soils were being hauled from the ESMI facility in Loudon and placed on the residential property described in #3 above.
5. On October 25, 2000, Division personnel visited the Dunbarton Town offices and learned that three residential properties were impacted. These three properties are located at Leg Ache

Hill Road and owned by Mr. Henry Langley, Mr. Andrew Drobat/Ms. Michelle Coleman and Mr. Michael Hayward in the Town of Dunbarton, NH, as shown on Town tax map number D-4. A right-of-way exists on the Langley property leading to the Drobat/Coleman property. Access to the Drobat/Coleman property through the Hayward property was reportedly by permission.

6. On October 26, 2000, Division personnel inspected the Hayward property to determine whether ESMI was in compliance with Section C, Item 11 of the Terms and Conditions of its permit (DES-SW-SP-96-002) and Env-Wm 3203.11 of the New Hampshire Solid Waste Rules, which prohibit the reuse of treated contaminated soils on residential properties.

7. Division personnel also intended to determine whether ESMI was in compliance with the Bypass and Residual Waste Management Plan, a component of the Operating Plan, which allows only 8-inch or larger steam treated boulders removed from the incoming waste stream at the facility for use as a general fill. Mr. Drobat, Ms. Christine Nardini, ESMI's Director of Regulatory Affairs, and Mr. Mark Aubrey also of ESMI were present at this visit.

8. During the inspection on October 26, 2000, Mr. Drobat, the owner of one of the properties who is also the individual constructing the driveway on the Hayward property, was asked if there was a representative pile of material on the Hayward property that was brought to the site from the ESMI facility, and not mixed with any other materials.

9. Mr. Drobat identified such a pile of thermally-treated soil that came from the ESMI facility that he was using for general driveway fill on the Hayward property, and the DES representative took a sample of the material. Mr. Drobat indicated that the ESMI material used at the Hayward property contained a higher proportion of fines than that used at the Langley and Drobat/Coleman property. Ms. Nardini stated that 2,900 tons of boulders and screening were used at the properties.

10. On November 28, 2000, Division personnel again visited the Hayward property, where a meeting was held with representatives of ESMI and its attorney.

11. At that meeting, ESMI's attorney explained that the materials the Division representatives were seeing in the fill on the Hayward property, and that was also used in the right-of-way on the Langley and Drobat/Coleman properties, consisted of screened stone sized between ¼ inch and 2 inches taken from the thermally-treated stockpiles of material at the ESMI facility in Loudon, and mixed by Mr. Drobat at the Hayward property with loam and clean sands from other sources.

12. The ESMI attorney also indicated that boulders 8 inches in diameter and larger that were removed from the incoming contaminated soils at the ESMI facility and that had been steam cleaned subsequent to removal from the contaminated soils were also taken to the properties in Dunbarton for use in the driveway fill.

13. During the visit to the property on November 28, 2000, Mr. Drobat was asked if any material other than that described by the ESMI attorney had been brought to the Hayward property from the ESMI facility in Loudon.

14. Mr. Drobat stated that only steamed cleaned boulders 8-inches in diameter or greater, and screened stone between ¼ and 2 inches in size had been brought to the Hayward property from the ESMI facility, a marked departure from what he had said to Division personnel at the October 26, 2000 site visit.

#### IV. Violation Alleged

1. ESMI has violated Section C, Item 11 of its permit and Env-Wm 3203.11(a) by allowing the use of thermally-treated soils in a residential application.

#### V. Proposed Administrative Fines

1. For the violation identified in IV.1, a penalty of \$1,500 has been calculated pursuant to Enc-C 610.

**The total fine being sought is \$ 1,500.**

#### VI. Hearing, Required Response

ESMI has the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, March 12, 2001 at 9:00 a.m. in Room C-110 of DES offices at 6 Hazen Drive in Concord, NH. Pursuant to Env-C 601.06, ESMI is required to respond to this notice. Please respond no later than February 20, 2001, using the enclosed form as follows:**

1. If ESMI plans to attend the hearing, please have an authorized representative sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, at the address noted on the form.
2. If ESMI chooses to waive the hearing and pay the proposed fine, please have an authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.
3. If ESMI wishes to discuss the possibility of settling the case, please have an authorized representative sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate ESMI's interest in settling.

ESMI is not required to be represented by an attorney. If ESMI chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

**If ESMI wishes to have a hearing but is unable to send an authorized representative to the hearing as scheduled, ESMI must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If ESMI does not notify Mr. Ballentine in advance and does not have an authorized representative attend the hearing, the hearing will be conducted anyway in accordance with Env-C 204.09.**

## **VII. Determination of Liability for Administrative Fines**

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that ESMI committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by “a preponderance of the evidence” means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that ESMI committed the violation(s) and that the amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that ESMI proves, by a preponderance of the evidence,** applies in this case:

The violation was a one-time or non-continuing violation, **and** ESMI did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** ESMI did not benefit financially, whether directly or indirectly, from the violation.

At the time the violation was committed, ESMI was making a good faith effort to comply with the requirement that was violated.

ESMI has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.

Other information exists which is favorable to ESMI’s case which was not know to the Division at the time the fine was proposed.

### **IMPORTANT NOTICE**

**The hearing that has been scheduled is a formal hearing.** The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is ESMI’s opportunity to present testimony and evidence that ESMI did not commit the violations(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If ESMI has any evidence, such as photographs, business records or other documents, that ESMI believes show that ESMI did not commit the violation(s) or that otherwise support ESMI’s position, ESMI should bring the evidence to the hearing. ESMI may also bring witnesses (other people) to the hearing to testify on ESMI’s behalf.

**If ESMI wishes to have an informal meeting to discuss the issues, ESMI must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.**

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Information regarding this proposed fine may be made available to the public via DES's Web page ([www.state.nh.us/des](http://www.state.nh.us/des)). If ESMI has any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

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Philip J. O'Brien, Ph.D., Director  
Waste Management Division

PJO/RSR/neo/permitsesmip

cc: Michael J. Walls, NHDOJ  
Gretchen Rule, DES Enforcement Coordinator  
Susan Alexant, DES Hearings and Rules Attorney  
Richard S. Reed, Administrator, SWMB  
ESMI Loudon File/DB